

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

RENEY VALDEZ,

03:10-CV-657-BR

Plaintiff,

OPINION AND ORDER

v.

MICHAEL J. ASTRUE,
Commissioner of Social
Security,

Defendant.

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BROWN, Judge.

Plaintiff Reney Valdez seeks judicial review of a final decision of the Commissioner of the Social Security Administration (SSA) in which he denied Plaintiff's application for Supplemental Security Income (SSI) under Title XVI of the Social Security Act. This Court has jurisdiction to review the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

For the reasons that follow, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this Opinion and Order.

ADMINISTRATIVE HISTORY

Plaintiff filed an application for SSI benefits on

December 20, 2002. The Administrative Law Judge (ALJ) issued an opinion on November 23, 2005, in which he determined Plaintiff was not disabled and, therefore, not entitled to benefits.

Tr. 12.¹

Plaintiff filed her current application for SSI benefits on April 12, 2006, and alleged a disability onset date of October 1, 1996. Tr. 120-22. The ALJ determined, however, that Plaintiff may only allege disability since November 23, 2005, because Plaintiff did not challenge the previous ALJ's determination of nondisability through that date. Tr. 15-17. Plaintiff does not challenge this ALJ's determination as to the onset date.

Plaintiff's April 12, 2006, application was denied initially and on reconsideration. Tr. 90-93, 96-98. An ALJ held a hearing on May 20, 2008. Tr. 43-83. Plaintiff was represented by an attorney at the hearing. Tr. 43. Plaintiff, lay witness Kenneth Wilken, and a Vocational Expert (VE) testified. Tr. 43-83.

The ALJ issued a decision on September 4, 2008, in which he found Plaintiff is not disabled and, therefore, is not entitled to benefits. Tr. 12-29. Pursuant to 20 C.F.R. § 404.984(d), that decision became the final decision of the Commissioner on April 8, 2010, when the Appeals Council denied Plaintiff's request for review. Tr. 1-3.

¹ Citations to the official transcript of record filed by the Commissioner on October 20, 2010, are referred to as "Tr."

BACKGROUND

Plaintiff was born on June 16, 1970, and was 37 years old at the time of the hearing. Tr. 49, 120. Plaintiff completed her education through the ninth grade. Tr. 49. She does not have any past relevant work experience. Tr. 51-52.

Plaintiff alleges disability due to migraine headaches with vomiting; depression; anxiety with panic attacks; fibromyalgia; chronic pain in her neck, wrists, back, hips, and legs; muscle spasms and weakness in her neck, shoulders, hips and legs; bilateral wrist pain and numbness with difficulty gripping objects; attention-deficit hyperactivity disorder; bipolar disorder; an inability to maintain concentration; asthma; memory difficulties; and post-traumatic stress disorder. Tr. 57-67.

Except when noted, Plaintiff does not challenge the ALJ's summary of the medical evidence. After carefully reviewing the medical records, this Court adopts the ALJ's summary of the medical evidence. See Tr. 17-26.

STANDARDS

The initial burden of proof rests on the claimant to establish disability. *Ukolov v. Barnhart*, 420 F.3d 1002, 1004 (9th Cir. 2005). To meet this burden, a claimant must demonstrate her inability "to engage in any substantial gainful

activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months."

42 U.S.C. § 423(d)(1)(A). The Commissioner bears the burden of developing the record. *Reed v. Massanari*, 270 F.3d 838, 841 (9th Cir. 2001).

The district court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g). See also *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). "Substantial evidence means more than a mere scintilla, but less than a preponderance, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)(internal quotations omitted).

The ALJ is responsible for determining credibility, resolving conflicts in the medical evidence, and resolving ambiguities. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). The court must weigh all of the evidence whether it supports or detracts from the Commissioner's decision. *Robbins*, 466 F.3d at 882. The Commissioner's decision must be upheld even if the evidence is susceptible to more than one rational interpretation. *Webb v. Barnhart*, 433 F.3d 683, 689 (9th Cir.

2005). The court may not substitute its judgment for that of the Commissioner. *Widmark v. Barnhart*, 454 F.3d 1063, 1070 (9th Cir. 2006).

DISABILITY ANALYSIS

I. The Regulatory Sequential Evaluation

The Commissioner has developed a five-step sequential inquiry to determine whether a claimant is disabled within the meaning of the Act. *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). See also 20 C.F.R. § 404.920. Each step is potentially dispositive.

In Step One, the claimant is not disabled if the Commissioner determines the claimant is engaged in substantial gainful activity. *Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006). See also 20 C.F.R. § 404.920(a)(4).

In Step Two, the claimant is not disabled if the Commissioner determines the claimant does not have any medically severe impairment or combination of impairments. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. § 404.920(a)(4)(ii).

In Step Three, the claimant is disabled if the Commissioner determines the claimant's impairments meet or equal one of a number of listed impairments that the Commissioner acknowledges are so severe as to preclude substantial gainful activity. *Stout*, 454 F.3d at 1052. See also 20 C.F.R.

§ 404.920(a)(4)(iii). The criteria for the listed impairments, known as Listings, are enumerated in 20 C.F.R. part 404, subpart P, appendix 1 (Listed Impairments).

If the Commissioner proceeds beyond Step Three, he must assess the claimant's Residual Functional Capacity (RFC). The claimant's RFC is an assessment of the sustained, work-related physical and mental activities the claimant can still do on a regular and continuing basis despite her limitations. 20 C.F.R. § 404.920(e). *See also* Soc. Sec. Ruling (SSR) 96-8p. A "'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent schedule." SSR 96-8p, at *1. In other words, the Social Security Act does not require complete incapacity to be disabled. *Smolen v. Chater*, 80 F.3d 1273, 1284 n.7 (9th Cir. 1996). The assessment of a claimant's RFC is at the heart of Steps Four and Five of the sequential analysis engaged in by the ALJ when determining whether a claimant can still work despite severe medical impairments. An improper evaluation of the claimant's ability to perform specific work-related functions "could make the difference between a finding of 'disabled' and 'not disabled.'" SSR 96-8p, at *4.

In Step Four, the claimant is not disabled if the Commissioner determines the claimant retains the RFC to perform work she has done in the past. *Stout*, 454 F.3d at 1052. *See also* 20 C.F.R. § 404.920(a)(4)(iv).

If the Commissioner reaches Step Five, he must determine whether the claimant is able to do any other work that exists in the national economy. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. § 404.920(a)(4)(v). Here the burden shifts to the Commissioner to show a significant number of jobs exist in the national economy that the claimant can do. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). The Commissioner may satisfy this burden through the testimony of a VE or by reference to the Medical-Vocational Guidelines set forth in the regulations at 20 C.F.R. part 404, subpart P, appendix 2. If the Commissioner meets this burden, the claimant is not disabled. 20 C.F.R. § 404.920(g)(1).

ALJ'S FINDINGS

At Step One, the ALJ found Plaintiff had not engaged in substantial gainful activity since November 23, 2005. Tr. 17.

At Step Two, the ALJ found Plaintiff has the severe impairments of migraine headaches, depressive disorder, an anxiety disorder, a somatoform disorder, and opiate dependence. Tr. 17.

At Step Three, the ALJ concluded Plaintiff's medically determinable impairments do not meet or medically equal one of the listed impairments in 20 C.F.R. part 404, subpart P, appendix 1. Tr. 24. The ALJ also found before September 1, 2005,

Plaintiff had the RFC to perform

light work (e.g., maximum lifting/carrying of 20 pounds) as defined in 20 CFR 416.967(b), except in recognition of psychological impairments the claimant is limited to performing simple, routine tasks. Work requiring teamwork is precluded. Contact with coworkers and the public should be limited to an occasional basis.

Tr. 14.

At Step Four, the ALJ concluded Plaintiff has not performed any past relevant work. Tr. 27.

At Step Five, the ALJ found Plaintiff could perform jobs that exist in significant numbers in the national economy including housekeeper, small-products assembler, and security guard. Tr. 27-28. Accordingly, the ALJ found Plaintiff is not disabled and, therefore, is not entitled to benefits. Tr. 28-29.

DISCUSSION

Plaintiff contends the ALJ erred when he (1) improperly rejected Plaintiff's testimony, (2) improperly rejected lay-witness testimony by Kenneth Wilken, (3) improperly evaluated Plaintiff's RFC with respect to Plaintiff's "marked" restrictions in social functioning, (4) failed to include in Plaintiff's RFC limitations from carpal-tunnel entrapment in her right wrist, (5) failed to adequately develop the record as to Plaintiff's functional limitations resulting from her carpal-tunnel entrapment, and (6) provided an incomplete hypothetical to the

VE.

I. The ALJ did not err when he rejected Plaintiff's testimony.

Plaintiff alleges the ALJ erred when he failed to provide clear and convincing reasons for rejecting Plaintiff's testimony. Plaintiff does not provide any specific basis for her argument that the ALJ erred beyond a mere assertion of error.

In *Cotton v. Bowen* the Ninth Circuit established two requirements for a claimant to present credible symptom testimony: The claimant must produce objective medical evidence of an impairment or impairments, and she must show the impairment or combination of impairments could reasonably be expected to produce some degree of symptom. *Cotton*, 799 F.2d 1403, 1407 (9th Cir. 1986). The claimant, however, need not produce objective medical evidence of the actual symptoms or their severity. *Smolen*, 80 F.3d at 1284.

If the claimant satisfies the above test and there is not any affirmative evidence of malingering, the ALJ can reject the claimant's pain testimony only if he provides clear and convincing reasons for doing so. *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007)(citing *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)). General assertions that the claimant's testimony is not credible are insufficient. *Id.* The ALJ must identify "what testimony is not credible and what evidence undermines the claimant's complaints." *Id.* (quoting *Lester*, 81

F.3d at 834).

The ALJ found Plaintiff's medically determinable impairments could reasonably be expected to cause her alleged symptoms, but he concluded Plaintiff's statements about the impact of her impairments on her ability to work "are accepted only to the extent they are consistent with the residual functional capacity." Tr. 26. The ALJ provided numerous bases for rejecting Plaintiff's subjective symptom testimony including the inconsistency of Plaintiff's statements, a well-documented history of drug-seeking behavior, Plaintiff's failure to follow and to complete prescribed treatment, and statements by physicians that reflect Plaintiff's reputation for untruthfulness. Tr. 18-26. Plaintiff does not provide any evidence that undermines these findings by the ALJ.

The Court concludes on this record that the ALJ did not err when he rejected Plaintiff's testimony as to the intensity and limiting effects of her symptoms because the ALJ provided legally sufficient reasons supported by the record for doing so.

II. The ALJ did not err when he rejected lay witness Kenneth Wilken's testimony.

Plaintiff contends the ALJ erred when he rejected the testimony of Plaintiff's boyfriend, Kenneth Wilken.

Lay testimony regarding a claimant's symptoms is competent evidence that the ALJ must consider unless he "expressly determines to disregard such testimony and gives reasons germane

to each witness for doing so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001). See also *Merrill ex rel. Merrill v. Apfel*, 224 F.3d 1083, 1085 (9th Cir. 2000)("[A]n ALJ, in determining a claimant's disability, must give full consideration to the testimony of friends and family members.>").

Wilken testified as to the pain, anxiety, and depression he perceives Plaintiff suffers. He specifically pointed out that Plaintiff's hand impairments cause her to "drop things." Tr. 71.

The ALJ summarized Wilken's testimony and accepted it "as descriptive of the witness's perceptions; however, it does not provide sufficient support to alter the residual functional capacity arrived at herein." Tr. 27. Thus, the ALJ concluded Wilken accurately recounted Plaintiff's presentation and subjective complaints, but the ALJ found Wilken's testimony was insufficient to alter the ALJ's evaluation of Plaintiff's RFC.

In light of the ALJ's extensive findings discrediting Plaintiff's subjective complaints and the numerous diagnostic medical tests that failed to disclose a source for Plaintiff's complaints of debilitating physical impairments, the Court concludes on this record that the ALJ did not err when he found Wilken's testimony was insufficient to alter the ALJ's assessment of Plaintiff's RFC.

III. The ALJ erred in his assessment of Plaintiff's RFC as to the limitations on her social functioning.

Plaintiff contends the ALJ erred in his assessment of

Plaintiff's RFC by limiting Plaintiff to work that does not require any teamwork or more than occasional public contact based on the ALJ's finding that Plaintiff has "marked" difficulties in social functioning. Tr. 20-21.

Plaintiff points out Dorothy Anderson, Ph.D., a nonexamining psychologist for Disability Determination Services (DDS),² found Plaintiff had only "moderate" limitations on social functioning and, as a result, is limited to occasional public and coworker contact. Tr. 243-60. Plaintiff also points out the ALJ expressly incorporated the opinions of the previous ALJ (in the determination of nondisability issued on November 23, 2005) in which that ALJ found Plaintiff had only "moderate" limitations on social functioning and, as a result, is limited to work not requiring teamwork or more than occasional contact with the public and coworkers. Tr. 16.

When reviewing Dr. Anderson's findings and the record as to Plaintiff's psychological impairments, the ALJ here concluded, however, that "new evidence" demonstrates Plaintiff has "marked" and "substantial limitations to social activities." Tr. 20. Despite his express finding of "marked" limitations on Plaintiff's social functioning, the ALJ merely incorporated into

² Disability Determination Services (DDS) is a federally funded state agency that makes eligibility determinations on behalf and under the supervision of the Social Security Administration pursuant to 42 U.S.C. § 421(a).

his assessment of Plaintiff's RFC those restrictions on Plaintiff's ability to interact with coworkers and the public set out by Dr. Anderson and the prior ALJ based on "moderate" limitations on social functioning. Tr. 20. The ALJ did not provide any explanation as to why the restrictions on Plaintiff's social functioning in her RFC remained exactly the same even though he found the severity of her social limitations had increased.

In summary, even though the ALJ concluded based on "new evidence" that Plaintiff's social restrictions were more severe ("marked") than previously determined, he did not explain or provide support for his decision to maintain the social restrictions based on "moderate" limitations on social functioning that were set out by Dr. Anderson and the prior ALJ. Thus, the ALJ's assessment of Plaintiff's RFC is not supported by substantial evidence in the record.

The Court, therefore, concludes on this record that the ALJ erred in his assessment of Plaintiff's RFC.

IV. The ALJ did not err in his assessment of Plaintiff's RFC by failing to include limitations on Plaintiff's use of her wrists.

Plaintiff contends the ALJ erred when he assessed her RFC because the ALJ failed to include Plaintiff's limitations on the use of her wrists. Plaintiff contends on the basis of her testimony, the lay-witness testimony of Kenneth Wilken, and a

nerve-conduction study included in the record that she has "bilateral hand/wrist/finger pain and numbness, which causes her to drop items she attempts to hold."

As noted, the ALJ did not find the testimony of Plaintiff and Wilken sufficient to establish limitations beyond those included in his assessment of Plaintiff's RFC. Plaintiff counters the nerve-conduction study performed by consulting neurologist Scott Emery, M.D., on January 14, 2008, supports the testimony of Plaintiff and Wilken. Tr. 477-81. Dr. Emery's study, however, reflects abnormal findings only with respect to Plaintiff's right wrist rather than with both wrists. Tr. 477. Dr. Emery's study revealed a "mild carpal tunnel entrapment without evidence of significant conduction block or axonal injury" as to Plaintiff's right wrist. Tr. 477-78. Dr. Emery did not otherwise describe any resulting limitations.

On February 29, 2008, however, Plaintiff's treating physician, James Hylton, M.D., submitted a physical-capacity evaluation of Plaintiff in which he reported Plaintiff could handle, finger, and feel "frequently" and without limitation. Tr. 598. Plaintiff does not identify and the Court has not found any medical evidence in the record that identifies any limitations on Plaintiff's ability to handle or to grip objects. As noted, the ALJ properly found Plaintiff's statements about the limiting effect of her impairments were not credible.

Accordingly, the Court concludes the ALJ did not err when he excluded limitations on Plaintiff's use of her hands and wrists from his assessment of Plaintiff's RFC.

V. The ALJ did not fail to develop the record as to the functional limitations resulting from Plaintiff's carpal-tunnel entrapment.

Plaintiff also contends the ALJ erred when he failed to develop the record as to the functional limitations resulting from the mild carpal-tunnel entrapment revealed in Dr. Emery's nerve-conduction study.

The Commissioner bears the burden of developing the record. *Reed v. Massanari*, 270 F.3d 838, 841 (9th Cir. 2001). When important medical evidence is incomplete, the ALJ has a duty to recontact the provider for clarification. 20 C.F.R. § 416.927(c)(2). *See also Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983)(ALJ has a "special duty to fully and fairly develop the record" even when claimant is represented by an attorney). When making disability determinations,

[i]f the evidence is consistent but we do not have sufficient evidence to decide whether you are disabled, or if after weighing the evidence we decide we cannot reach a conclusion about whether you are disabled, we will try to obtain additional evidence We will request additional existing records, recontact your treating sources or any other examining sources, ask you to undergo a consultative examination at our expense, or ask you or others for more information.

20 C.F.R. § 404.1527(c)(3).

Plaintiff, however, has not demonstrated this record is incomplete as to Plaintiff's alleged wrist limitations. As noted, Plaintiff underwent a significant neurological examination by Dr. Emery. Tr. 477-81. Although Dr. Emery's neuro-diagnostic tests reveal a "mild" entrapment, he did not find any additional evidence of nerve disruption. Tr. 477-78. Furthermore, Plaintiff's treating physician set out at length Plaintiff's physical capacity and stated Plaintiff did not have any limitations with respect to the use of her hands. Tr. 597-98.

On this record the Court concludes the ALJ did not fail to satisfy his duty to develop the medical record.

VI. Hypothetical to the VE.

Plaintiff contends as a result of the ALJ's errors in assessing Plaintiff's RFC with respect to her social functioning and limitations on the use of her wrist, the ALJ erred by failing to give a complete hypothetical to the VE at the hearing on May 20, 2008. The Court has already determined the ALJ did not err in his assessment of Plaintiff's RFC as to limitations on the use of her hands and wrists. The Court, however, has concluded the ALJ's assessment of Plaintiff's RFC with respect to limitations resulting from "marked" difficulties with social functioning is not supported by substantial evidence in the record. Thus, the record is insufficient to determine whether the hypothetical posed to the VE was, in fact, incomplete.

REMAND

Generally the decision whether to remand for further proceedings or for immediate payment of benefits is within the discretion of the Court. *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). See also *Smolen*, 80 F.3d at 1292. The Ninth Circuit, however, has established a limited exception to this general rule. *Id.* Under the limited exception, the Court must grant an immediate award of benefits when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Id. The second and third prongs of the test often merge into a single question: Whether the ALJ would have to award benefits if the case were remanded for further proceedings. See *id.* at 1178 n.2.

As noted, the ALJ determined new evidence added to this record since Plaintiff's last unfavorable disability determination on November 23, 2005, reflects Plaintiff suffers from "marked" difficulties in social functioning. The ALJ, however, adopted limitations set out in the opinions of DDS physician, Dr. Anderson, and the prior ALJ with respect to Plaintiff's ability to interact with coworkers and the public

that were based on findings of "moderate" restrictions on social functioning rather than "marked" restrictions. This record does not reflect what, if any, additional restrictions result from Plaintiff's "marked" difficulties in social functioning nor does the record indicate how additional restrictions might affect Plaintiff's ability to perform jobs of housekeeper, small-products assembler, or security guard, which Plaintiff contends each require at least occasional contact with the public and coworkers.

Accordingly, the Court remands this matter for further administrative proceedings consistent with this Opinion and Order.

CONCLUSION

For these reasons, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this Opinion and Order.

IT IS SO ORDERED.

DATED this 23rd day of June, 2011.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge